

Consumer Electronics Retailers Coalition



January 27, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B201
Washington, D.C. 20554

Re: Competitive Status of Cable Modems; GN Docket No. 00-185, CS Docket 02-52, CS Docket 97-80.

Dear Chairman Powell:

As the prospect of competitive markets for cable entertainment “navigation devices” moves closer to reality, the members of the Consumer Electronics Retailers Coalition (CERC) look forward to competing for the attention and resources of consumers and competitive manufacturers. A disquieting trend, however, of technical and economic discrimination against competitively sourced products, has developed in the market for cable modem products, which already enjoy a uniform technical standard. This trend, and the practices we discuss in this *ex parte* letter, are of significant, direct, and immediate concern to CERC as to the state of and prospects for competition in the cable modem market. They also warn of the challenging task ahead if a fully competitive market for cable navigation devices is to be established.

CERC is an association of leading consumer electronics retailers and retailing associations: Best Buy Co., Inc.; Circuit City Stores, Inc.; Good Guys, Inc.; RadioShack Corporation; Sears, Roebuck & Co.; Tweeter Home Entertainment Group, Inc.; Ultimate Electronics, Inc.; The International Mass Retail Association; The National Retail Federation; and The North American Retail Dealers Association. CERC members strongly supported Section 304 of the 1996 Telecommunications Act, when it was introduced by Reps. Bliley and Markey, to bring to the DTV and broadband transitions the sort of technological and price competition that followed the deregulation of telephone customer premises equipment.¹ As we know firsthand the transformative power of a competitive market, CERC members believe that any hurdle for competitive entry into device markets is also a prime obstacle to the DTV and broadband transitions.

¹ The Commission recognized and embraced this objective as well in its navigation devices Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14,775, 14,784-85 (1998): “Just as the *Carterfone* decision resulted in the availability to the consumer of an expanding series of features and functions related to the use of the telephone, we believe that Section 629 is intended to result in the widest possible variety of navigation devices being commercially available to the consumer.”

CERC and its members have participated fully in Docket 97-80 since its outset. When CERC has urged the Commission to address obstacles to competitive entry, the cable industry has pointed to the *DOCSIS* cable modem standard as evidence and example of its ultimate commitment to competitive markets.² CERC has answered that in the case of broadband services cable was starting from zero in competition with DSL (or DBS), so it had a strong incentive to achieve equal conditions for competitive entrants.³ Yet on August 6, 2002, a group of cable modem manufacturers not affiliated with CERC, the “Cable Modem Coalition,” provided compelling evidence to the Commission that even in this market, economic and technical barriers to entry were being erected that no entrant reasonably could be expected to overcome.⁴ More recently, events and displays at the International Consumer Electronics Show (“CES”) demonstrated the growing importance and vitality of modem-based wireless home networks.

According to the facts presented to the Commission by the Cable Modem Coalition:

- Time Warner Cable requires the same charge for cable modem service, irrespective of whether a modem is received from T-W cable or purchased competitively. In other words, this cable MSO has entirely bundled the modem charge into the service, so as to obviate competition as surely as if it still enjoyed a “no attach” rule for competitive products.⁵
- In May 2002 AT&T Broadband imposed a \$7 per month rate hike *only* for customers owning their own modems -- including customers who had already purchased competitive products.⁶
- Other cable MSOs continued to offer a separate rate to competitive customers, but reduced their discounts for self-supplied modems precipitously and, apparently, arbitrarily.⁷

The emphasis on wireless home networking technologies at the CES showed that this technology area has the *potential* to create demand and utility for broadband access. Yet according to the same filing, CableLabs’ adherence to anticompetitive and outmoded *product certification* practices makes it difficult for cable modem products other than those created through MSO-sanctioned procurement to compete on a timely basis:

- Long certification cycles increase time to market for competitive products.⁸

² See, e.g., *NCTA ex parte letter*, CS Docket No. 97-80, June 4, 2002, p. 1.

³ See, e.g., *CERC Reply to NCTA, ex parte letter*, CS Docket No. 97-80, August 1, 2002, p. 9.

⁴ *Reply Comments Of The Cable Modem Coalition*, GN Docket No. 00-185, CS Docket No. 02-52, August 6, 2002.

⁵ Cable Modem Coalition Comments at 4.

⁶ *Id.* at 5. This sets a frightening standard for future consumer reliance on competitive device markets.

⁷ *Id.*

⁸ *Id.* at 6.

- Manufacturers must re-certify products if they make any change; even trivial changes like the color of the product require a review that takes several weeks and costs \$15,000, while changing an approved product's case requires submission to a CableLabs review lasting from 2 weeks to 3 months and costing \$15,000 to \$45,000 depending on the specific change.⁹ Moreover, it has been retailers' experience that even after CableLabs certification has been received, additional review and certification steps may be required by individual cable MSOs -- contrary to the notion that the DOCSIS specification provides a "plug and play" solution.
- Competitive cable modem manufacturers "cannot include popular Internet Gateway features like routing and firewall capability [the very features attracting so much attention at the recent CES] in their cable modems without CableLabs approval of the technology."¹⁰

CES attendees witnessed the events and displays demonstrating the growing importance and vitality of modem-based wireless home networks. The potential for damage to this market from the practices described above is clear and compelling.

These economic and technical impositions on the "showcase" product for retail competitive availability demonstrate that much work remains if the "right to attach," declared in 1998 for all navigation device products, including cable modems,¹¹ is to be meaningful in the marketplace. That these obstacles to entry remain in 2003 betrays either a persistence of the "RFP" mindset, or a conscious desire to maintain advantages for MSO-ordered products and disadvantages for competitive products. Unfortunately, there still resides with cable MSOs and CableLabs the power to stifle all competitive entry of cable modem products which they do not specifically approve. Such was not the case in telephone device deregulation.

It has been clear since 1998 this power will be used, and will retard competitive entry, unless and until countervailing power or authority is brought to bear. One way to do this, when lack of competitive entry becomes intolerable, is for the Commission or the Congress to declare or enact further and specific rights in favor of the frustrated entrants, or to apply strong and specific pressure to force an accommodation. Another way -- in CERC's view more efficient -- is for the Commission to reform its regulations so as to remove these obsolete and arbitrary elements of the deregulated industry's power over competitive entrants.

In the context of the Commission's Year 2000 Review on navigation devices, CERC proposed such reforms to Commission regulations, so as to eliminate remaining technical and economic obstacles to a "level playing field."¹² In the context of cable modems, the Cable

⁹ *Id.*; and additional information received from Cable Modem Coalition.

¹⁰ *Id.*

¹¹ Navigation Devices Order, at 14,785.

¹² The CERC proposals were repeated in and attached to the August 1, 2002, *ex parte* Reply noted above.

Modem Coalition has proposed an anti-subsidy rule, which CERC hereby endorses.¹³ 2003 will be a critical year for both the Broadband and DTV Transitions, in which they will merit and receive much attention. It would behoove competitive markets for the Commission to make crystal clear that the imposition of arbitrary economic and technical hurdles in the path of critical new products is no longer acceptable. Such practices, already damaging in the context of broadband, will be no less so in the context of the DTV transition -- where many pricing and technical questions pertaining to competitive navigation devices remain to be resolved.

CERC greatly appreciates, Mr. Chairman, the priority that you have assigned to moving these transitions forward (as shown by your own comments at CES). As retailers we remain actively interested in a truly competitive market for broadband access devices. We pledge our interest and our participation in any public policy steps the Commission may consider to achieve this goal.

Sincerely,

/s/ Bradbury H. Anderson

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¹³ Cable Modem Coalition comments at 10-12.

The Honorable Michael K. Powell

January 27, 2003

Page 5

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